Lightship and Eschelon TRO Remand Issues

October 28th 2004

Discussion Topics

- UNE loops and transport remain necessary to facilities-based competitors in most markets
- UNE-P is an essential adjunct for facilities based CLECs serving SMEs
- 271 unbundling obligations should not be dismissed without an affirmative proceeding to establish the appropriate application of such requirements

The Importance of Loops and Transport

- The BOC UNE "Fact" Report creates significant misperceptions about the availability of competitive loops and transport:
  - E.g., Statement that 55% of wire centers representing 80% of BOC special access revenue have collocated fiber (I-1)
  - E.g., Assertion that wireless, cable are viable enterprise alternatives (I-7)
  - E.g., Assertion that CLECs provide more voice grade lines over their own facilities than over BOC facilities (I-9)
- These statements are disingenuous and misleading:
  - One deployed fiber loop in a wire center does nothing for local loop competition
  - Wireless and cable are not alternatives to enterprise loops today
  - An extreme example of creative line counting (the BOC analysis shows MCI alone with more access lines than all BOCs combined)
- For the vast majority of locations (particularly outside core downtown areas of largest cities) the ILEC is the only alternative for the foreseeable future
- Even as some isolated alternatives emerge, it would be operationally very challenging to obtain wholesale facilities from a large number of players

A Facilities-Based Approach to UNE-P

- UNE-P is important to facilities-based CLECs, particularly those serving customers outside the major city centers.
  - Our impairment argument is not based on the cost of switch deployment, but on the cost of deploying collocations
  - Facilities-based CLECs use UNE-P as network “fillers” for multi-location customers (For Lightship that represents 40% of customers and 50% of revenue. For Eschelon, that represents 50% of customers.)
  - Without UNE-P multi-location customers in most regions would face a monopoly supplier (For Lightship, 17% of sites for multi-location customers would not qualify for an on-net product.)
  - Facilities-based CLECs also use UNE-P to get seed business that justifies deploying facilities in new markets – it takes time to build the needed business base to justify facilities in small wire centers (For Lightship it would take approximately $40 million to collocate in all of its wire centers.)

A Facilities-Based Approach to UNE-P (cont.)

- We believe that a CLEC is impaired without access to UNE-P if its network costs to serve the small enterprise customer segment is materially higher than the network costs for the ILEC to serve that same customer segment:
  - This is consistent with the TRO definition: a requesting carrier is impaired when lack of access to an ILEC network element poses a barrier to entry, including operational and economic barriers, that is likely to make entry into a market uneconomic. (*TRO* at para. 84)
  - This makes sense in practice since CLECs must beat the ILEC price by 15-20% to win business
  - Resale is not an alternative since the margin opportunity it offers with respect to the BOC street price is minimal to negative

A Facilities-Based Approach to UNE-P (cont.)

- We propose the following impairment rule:
  - Any CLEC will be impaired without access to UNE-P in a wire center if the CLEC has less than 1344 customer DS0s in that wire center
  - Once a CLEC has reached 1344 DS0s in a wire center, additional DS0s in that wire center will not be eligible for UNE-P
  - Once a CLEC has reached 1344 DS0s in a wire center, the existing DS0s in that wire center must be transitioned away from UNE-P on a schedule consistent with the transition schedule developed by the FCC in the TRO

A Facilities-Based Approach to UNE-P (cont.)

- When a CLEC has 1344 DS0s in a wire center, it can collocate and transition to UNE-L with a cost structure similar to the ILECs cost structure:
  - By definition, the ILEC's cost to provide a DS0 is the UNE-P cost
  - By moving from UNE-P to UNE-L, a CLEC saves on average $3.00 per DS0
  - The one time cost to collocate in a wire center is typically $60,000 - $70,000. With the return required by telecom investors, this represents a cost burden of $1.50 per DS0
  - The minimum monthly operating expense for collocation is approximately $2,000
  - Thus, 1344 DS0s are required to ensure that the cost of collocation does not exceed the savings of transitioning to UNE-L

A Facilities-Based Approach to UNE-P (cont.)

- The proposed rule is consistent with the FCC's articulated impairment standard in the TRO, and with USTA II
  - The USTA II court did not reject the FCC's impairment analysis and determination
  - USTA II requires the FCC to consider nuanced alternatives to nationwide impairment
  - USTA II permits the FCC's continued reliance on natural monoploy characteristics, and other structural impediments to competitive supply
  - The proposed rule is based on the economics of collocation deployment by an average, reasonably efficient CLEC
  - Granular market-specific evidence supports a finding of widespread, if not universal, impairment.
  - The proposed rule provides a self-executing way to eliminate UNE-P when impairment no longer exists
  - The proposed rule is limited and rationally related to the goals of the '96 Act.

A Facilities-Based Approach to UNE-P (cont.)

- This proposal has wide support. Many parties have either endorsed it or proposed something similar:
  - ALTS member companies, including: Cbeyond, Blackfoot, U.S. Telepacific, Eschelon, Choice One, Biddeford Internet, Pac-West, US LEC, Lightship, Globalcom, Megagate, Broadriver, Network Telephone, Supra, Cavalier, New Edge, Conversent, segTel, TDS Metrocom, NuVox.
  - Other Commenters, including: Michigan-based CLEC Coalition (ACD, Affinity, CMC, grid4, JAS, Quick Connect, Superior, TC3, and TelNet); PACE Coalition, Broadview, Grande, Talk America; ACN.

271 Approval Requirements Cannot be Ignored

- The RBOCs are pushing to water down 271 requirements by asking the FCC to automatically incorporate changes in 251 obligations into 271 obligations
- However 271 establishes *independent* UNE obligations in return for LD approval
- Most 271 approvals suggest that the 251 obligations in effect at the time of the 271 approval are *sufficient* to meet the 271 obligations
- However, it is not clear (in the absence of an affirmative state level factual proceeding) if any *reduced* 251 obligations are *still sufficient* to meet the 271 obligations
- Unless the FCC is prepared to temporarily suspend LD authority for the RBOCs, it should keep in place all UNEs that were the basis of any 271 approval until an affirmative state-level determination can be made that 271 obligations do not require the particular UNEs in question at TELRIC prices